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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

IN THE MATTER OF THE PRESBYTERIAN MUTUAL SOCIETY LIMITED (IN ADMINISTRATION)

BETWEEN:

ARTHUR BOYD AS ADMINISTRATOR OF THE PRESBYTERIAN MUTUAL SOCIETY LIMITED

Applicant:

-and-

THOMAS ERNEST HOWIE

Respondent.

NO. 1

DEENY J

[1] This application is brought by Mr Arthur Boyd, a licensed insolvency practitioner, in his capacity as the administrator of the Presbyterian Mutual Society Limited ("the Society"). He was appointed to that position by its Directors on 17 November 2008. They had formed the view that the liabilities of the Society exceeded its remaining assets. This was apparently due to the fall in the value of property which took place throughout that year combined with a withdrawal of money invested with the Society as loans or otherwise in the period of time preceding the administration.

[2] Mr Stephen Shaw Q.C. led Mr Jonathan Dunlop for the administrator. Thomas Ernest Howie is a gentleman who had transferred a sum in excess of £600,000 to the benefit of a charitable trust. I was informed from the Bar that this trust was for the purposes of providing orphanages and schools in Africa. Early in 2009 Mr Howie became aware that Mr Boyd wished to distribute monies, when he was in a position to pay a dividend, to two classes of persons. The class to which Mr Howie's trust belonged were those who had lent money to the Society as loan capital and who received interest upon those

monies. The Society was not entitled to take deposits like a bank but interest was paid in a way similar to that of a bank or building society. There is no dispute that people in that capacity, who together have invested about £200m in the Society, are entitled to participate in a dividend as creditors. However, Mr Howie was unhappy with the administrator's proposal that the dividends should be distributed pari passu not only to the loan capital holders but to those with withdrawable share capital in the company, the value of whose investments totals some £100m. As early as last May Mr Howie through his solicitors, Messrs Carson and McDowell, and counsel Ms Jacqueline Simpson sought to have this matter tested, if necessary before the court by way of a summons. They were persuaded that Mr Boyd would bring the matter before the court of his own initiative but this was not in fact done until his present application was served on the court on 14 December 2009. The administrator sought a hearing before the court before Christmas. This proved impracticable as his counsel was unable to conduct the case on the date offered by the court. However on the occasion of the abortive hearing I expressed concern that an application which would impact on such a large class of persons be decided in a situation of inequality of arms in that the administrator was represented by leading counsel whereas Mr Howie was not, was vulnerable in costs and was being asked to respond at very short notice. The administrator agreed to a suggestion from the court that he would become liable for the costs of Mr Howie for the hearing so as to ensure that that class of persons were represented and that such representation would include leading counsel. The court therefore had the benefit of helpful skeleton arguments and oral argument not only from Messrs Shaw and Dunlop but from Mr Mark Horner QC and Ms Simpson. A number of matters were raised by the administrator in his application on which I will hear the parties in due course. But the subject of this judgment is the matter raised above i.e. : Are the holders of paid up withdrawable shares in the Society to be treated as creditors for the purposes of paragraph 4(1) of Schedule B (1) to the Insolvency (NI) Order 1989?

[3] The provisions of the Insolvency Order 1989 (which has been amended by the Insolvency (NI) Order 2005) apply to this Society by virtue of the Insolvency (Company Arrangement or Administration Provisions for an Industrial and Provident Society) Order (NI) 2008 (No. 445) made by the Department of Enterprise, Trade and Investment pursuant to powers under the Insolvency (NI) Order 2005. By virtue of Article 2 of the said statutory instrument Parts II and III of the Insolvency Order were specifically applied to the Society. By virtue of Article 21 of the Insolvency (NI) Order 1989 (as inserted by Article 3(1) of the Insolvency (NI) Order 2005), the new Schedule B (1) to the 1989 Order became operative in relation to administrations. It is common case that the administration of the Society is subject to the provisions of Schedule B(1).

[4] Paragraph 4(1) of Schedule B 1 reads:

> "4(1) The administrator of a company must perform his functions with the objective of:
>
> (a) rescuing the company as a going concern, or
>
> (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
>
> (c) realising property in order to make a distribution to one or more secure or preferential creditors."

There are no secured or preferential creditors of the Society. The administrator has formed the view that the company cannot be rescued as a going concern although he is hopeful of a significant recovery in the value of the property which the Society either owns itself or with regard to which it has granted mortgages to others. The Society enjoys an annual income from its loans and properties of £7.4m. Furthermore a number of borrowers have paid off loans or made new loan arrangements with other lenders. The net effect of this is that Mr Boyd now has some £20m which he wishes to distribute. He must do so on foot of paragraph 4(1)(b) for the creditors. This is reinforced by paragraph 4(2) which requires him to perform his functions "in the interests of the company's creditors as a whole".

[4] Paragraph 66(1) of the Schedule reads:

> "The administrator of a company may make a distribution to a creditor of the company
>
> (3) The payment may not be made by way of distribution under this paragraph to a creditor of the company who is neither secured nor preferential unless the High Court gives permission."

Mr Boyd therefore seeks the permission of the court to make the distribution. But he also seeks directions as to who the creditors of the company are. It is right to say that paragraph 67 provides that the administrator may make a payment otherwise than in accordance with paragraph 66 or paragraph 14 of Schedule 1 but that is only "if he thinks it likely to assist achievement of the purpose of administration". As set out above the purpose of the administration is for the benefit of the creditors. ('Purpose' in para.67 must, I think, be synonymous with 'objective' in para.4.) It is therefore imperative to decide before this money is distributed whether it goes to the loan capital

holders only or whether it may be distributed also to the members qua shareholders also

[5] The administrator is concerned for the shareholders in the Society. By virtue of the provisions of the Industrial and Provident Societies Act (NI) 1969, as amended, the maximum shareholding in a society of this kind is to the value of £20,000. Those who wished to invest more heavily in the company generally, subject to some reservations below, held shares to the value of £20,000 with loan capital in addition. Those with more modest sums to invest, below £20,000, are almost all shareholders only. They have not been able to get access to the money they invested as shares, which in many cases is apparently their only savings, while the Society has been in administration. Furthermore if there is ultimately a shortfall at the conclusion of the administration of the Society it will fall more heavily, or perhaps exclusively, on them, if they are not "creditors" of the Society. It is true that at least the greater number of loan capital holders are also shareholders but the extent of their loan capital will tend to be larger than the value of their shares. In effect therefore it is the small investors in the Society who stand to lose rather than the larger investors. As pointed out at paragraph [2] above those larger investors of course are not all of a wealthy or commercial nature but would include trusts of one kind or another or Presbyterian congregations.

[6] The intentions of the administrator are in charitable terms entirely laudable therefore. Counsel on his behalf submits that this is in accordance with the mutual nature of the Society. Furthermore there is no definition of creditor which prevents the court adopting such an approach, he submits. In practice, it is contended, the Society treated its shareholders and loan capital holders as indistinguishable during the lifetime of the Society and that approach should be continued by the court in the present situation. It is necessary to examine those submissions.

[7] Firstly, it is right to say that there is a paucity of definition of "creditors" in the various relevant statutory provisions. While no assistance is to be gained on this occasion from Words and Phrases Legally Defined (4th edition) the administrator seeks some assistance from Strouds Judicial Dictionary of Words and Phrases, 7th Edition, Volume 1, page 596, which draws attention to a decision at first instance in Gibb v Lombank Scotland Limited (1962) SLT 288 where it was held that the word "creditor" is one which is capable of a certain flexibility of meaning according to the context in which it is used. It is not a word affixed in rigid meaning defined by authority. On the other hand one notes that it does not ordinarily include a person who has a contingent or future claim against a debtor: Re Casse, ex parte Robinson v Trustees [1937] Ch. 405. Furthermore a person whose debt is secured by a Bill not mature, though he has notice that it will not be met (Re Powell [1892] W.N. 94) or whose debt has been attached is not a creditor

within the meaning of the Companies Act on a winding up. A creditor of the company must be a creditor on the date when the company was dissolved; anyone purporting to become a creditor of the company after its dissolution, whether or not knowing of its dissolution is not a creditor for the purposes of the Companies Act. Re New Timbiqi Goldmines [1961] 1 Ch. 319.

[8] It is important to examine the rules of the Society itself. Section 13 (1) of the Industrial and Provident Societies Act (N.I.) enacts that such rules shall bind the Society and its members "as if each member had executed them as a deed." Mr Shaw QC drew attention to Rule 3(a) and (b). They read:

> "The objects for which the Society is formed are:
>
> (a) to promote thrift amongst its member by the accumulation of their savings;
>
> (b) to use and manage such savings for the mutual benefit of members …"

Rule 4 provides that membership shall only be available to members of the Presbyterian Church in Ireland over the age of 18 years and their families, with certain qualifications. A corporation or unincorporated body shall be admitted if the Board is satisfied that the Corporation is representative of members of the Presbyterian Church in Ireland. That permits Presbyterian Congregations and like bodies to become members. Application for membership pursuant to Rule 5 shall be for not less than the minimum number of shares which by Rule 8 is one share of £100 but as mentioned before there is a maximum, currently £20,000. Rule 9 allows a dividend to be paid on shares. Rule 10 provides for share transfers which can only be to another member or body entitled under Rule 4.

[9] Rule 11 is of particular relevance and I set it out in full:

> "Subject to rule 19 a member may apply to withdraw the amount paid in respect of any share or shares subject to the Society's right to require not less than 21 days notice of such intention from a member. On repayment of the amount paid up in respect of all shares he shall cease to be a member but the Board either generally or in particular case or cases may waive such notice of (sic) the Society."

Mr Boyd avers that until a few weeks before the Society went into administration such notice was not in practice required by the Society. But it is clear that what was required by the rules was an application to withdraw the amount by the shareholder. He remained a member, but could

reasonably argue that he was owed the value of his shares once he or she sought that until he was paid in respect of those shares when he or she ceased to be a member. This draws attention to a central difficulty in the administrator's submissions. If he is right the shareholders are creditors of the company by virtue of their shareholdings. This is an inherently difficult proposition. The rights under the shares we will look at in a little more detail but they clearly constitute the shareholder as a member of the Society by virtue of those shares. As such he is one of the persons who can by his votes control the actions of the Society through its Board (Rules 31 to 49). As has been stated above he can earn dividends on foot of those shares. As can be seen subsequently he may be able to benefit in certain circumstances from the disposal of the Society. A creditor, on the other hand, is essentially a person who is owed money. They are inherently different concepts. It would appear to me that one of these shareholders could not properly be described as a creditor of the company until and unless he had applied to withdraw his shares and be paid on foot of Rule 11. At that point having made such an application he could reasonably argue that he was owed money by the Society and had become a creditor (if the Society had imposed no notice period or that period had expired).

[10] My view on that is reinforced by s. 66(e) of the 1969 Act which enacts that "in the case of a withdrawable share which has been withdrawn, a person shall be taken to have ceased to be a member in respect of that share as from the date of the notice or application for withdrawal."

[11] There was a paucity of authority on the precise point in issue. But it is clear that the court can derive assistance from <u>In Re United Citizens Investment Trust Limited</u> [1932] 1 Ch. 395. This was a decision of the Court of Appeal in England (Lord Hanworth MR, Lawrence and Romer LJJ) affirming a decision of Maugham J (as he was then). By the rules of that Industrial and Provident Society (incorporated under the Industrial and Provident Societies Act 1893) with a capital consisting partly of withdrawable and partly of transferable shares, holders of withdrawable shares could at any time give six months notice in writing to receive the money back paid up on their shares. An association which was a member of the Society gave notice dated 18 October 1929 to withdraw some of its shares. On 18 March 1930 ie. less than six months later, the Board of Directors sent out a notice of an EGM with a circular showing that the continuance of the Society was practically impossible. At a meeting on 30 April 1930 a resolution to wind up was passed. On a summons by the liquidator asking, inter alia, whether notices of withdrawal unexpired before the date of the notice calling the extraordinary general meeting but expired before the date of the winding up resolution were effectual the court formed the following view. The Association (shareholder) having had notice during the currency of the notice period that the Society could no longer carry on its business as a going concern was not entitled to repayment on the maturing of its notice. The principles regarding

notices of withdrawal in the case of building societies were equally applicable to industrial and provident societies. In his judgment at pages 404, 405 Maugham J said:

> "The main question that I have to decide is when and in what circumstances the holder of the withdrawable shares becomes a creditor of the Society in lieu of being a shareholder and, so to speak, a partner in a going concern. It is not immaterial to note that the notice, although in the first instance it had to be and in fact remained at six months notice, might have been reduced to six days. I will say here by way of preface to what I am going to decide, that the material date, from the point of view of the Society as a whole and from the point of view of the possibility of the Boards being able to carry out its duties is the date when the notice, whether it be six months or six days, expires. The rule in my opinion clearly points out that when the notice matures the member becomes entitled to receive the sum which is paid up on his share and becomes a creditor of the Society."

[12] I apply that conclusion to the present case, conscious of the approval by the Court of Appeal of the judgment at first instance. A shareholder in the Presbyterian Mutual Society Limited becomes a creditor of the Society when he has an entitlement to receive the sum which he has paid up on his share. That is either at the time he applies or, if the Society is imposing a 21 day period as it did in October 2008, at the conclusion of that period. It follows therefore that those shareholders who did not withdraw their shares under Rule 11 either before any notice period was imposed or after the expiry of a 21 day notice period, in mid November 2008, cannot be creditors of the Society. This seems to me a central difficulty on which the well intentioned submissions of the administrator must founder.

[13] For completeness however I will address some other relevant matters which in my view tend to towards the same outcome. Rule 12 of the Rules provides that the Secretary shall maintain a register of members and officers which shall include:

> "(c) A statement of each investment in the Society whether in loans are otherwise, held by each member."

Therefore the Rules of the Society contemplated the member investing either by way of loans or otherwise and otherwise therefore must refer to the shares

pursuant to Rules 4, 8 and 11, which are not therefore "loans" to the Society making the lenders creditors.

[14] Rule 14 provides that the balance of profit may on the recommendation of the Board be available for distribution pursuant to Rule 9. Mr Boyd averred, with documentary examples, that the approach of the Board of the Society was in fact to make no difference between the dividend to shareholders and the interest paid to the loan capital holders. I accept that. It does not seem to me that that was unlawful or improper on the part of the directors of the Society. But one cannot extrapolate from that and thereby say that the administrator or the High Court is bound by that practice on behalf of the then directors of the Society. Mr Shaw was unable to point to any authority for saying that such an approach could go as far as a waiver or estoppel. Even if it did that would not be binding on the administrator or this court in my view.

[15] Mr Shaw drew attention to Rule 60 of the Rules of the Society to the effect that in any dissolution of the Society the surplus assets thereof "shall be transferred to the trustees of the Presbyterian Church in Ireland to be held by them on trust as to both capital and income for the Home Mission of such Church or such other purposes of said Church being charitable in law as the Executive Committee of said trustees from time to time or on one occasion decide." He relied on that as indicating that the shareholders were not shareholders in the sense of an ordinary limited company where they would benefit on the sale of the company as a going concern. Here he submitted the benefit would only go to the charitable purposes of the Presbyterian Church. However Mr Horner pointed to Section 61 of the Industrial and Provident Societies Act (NI) 1969. Pursuant to sub-section (1) of that section a Society such as this "may by special resolution determine to convert itself into a company to be formed and registered under the Companies (NI) Order 1996 or transfer its engagements to a company formed and registered under that Order." Therefore rather than dissolve itself the members of the Society could transfer the engagements of the Society to a Northern Ireland company. There is no reason why in principle in that event the shareholders should not be paid a dividend if, of course, circumstances were favourable to such an outcome.

[16] It had been submitted at one point on behalf of the administrator that all investors had their monies placed as shares until and unless they exceeded the maximum holding of £20,000 when they were then allocated loan capital. This was set out in support of the submission that the two classes were really identical. However the second affidavit of Mr Arthur Boyd of 14 January 2010 showed that the position was rather different. Analysis carried out on his behalf showed that of the 10,032 accounts in the Society a significant number of accounts, 949, did not in fact have a full allocation of shares but did have millions of pounds in loans (in all). It would imply either that they

were therefore not allocated the full maximum quota of shares when the account was opened or they were allowed to withdraw share capital in preference to loan capital subsequently.

[17] Indeed some 595 members of the Society who have invested money totalling some £7.5m have done so by way of loan capital only and have no share capital. This is entirely in accord with the Rules of the Society because Rule 26 thereof provides that the Society may borrow money from its members "and others". It would appear therefore that on a factual basis it is not correct to say that the Society drew no distinction between these two forms of investment. Obviously this not insignificant minority of account holders, some 15%, have not suffered any detriment by this but rather the reverse. They will be entitled to benefit as creditors under any dividend now paid or any ultimate completion of the administration of the Society ahead of the shareholders.

[18] I note the express terms of Section 63 of the Insolvency (NI) Order 2005. "The administrator of a company may call a meeting of members or creditors of the company." That also points to two different species. While a member of a company may also be a creditor of a company on foot of a separate loan or service provided to that company any purposive interpretation of the provisions would conclude that one does not become a creditor of a company by virtue of becoming a member. And see Re McFarland Harvey Ltd [2000 NIJB 300. To argue that the shareholders are by virtue of those shares creditors of the Society is close to a nonsense. If that were the case then the share capital provided by the shareholders should properly be regarded as a debt of the Society rather than its capital, which it is. The accounts of the Society correctly refer to "Share capital repayable on demand."

[19] For all these reasons I conclude that the members of the Society in respect of their shareholding in the Society cannot be described as creditors. The court has every sympathy with persons who find themselves in difficult circumstances because this Society was caused to go into administration through no fault of theirs. But the court is not at liberty to provide a remedy by standing language on its head. Any redress must be found elsewhere.